SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 73-1388

October Term, 1973

MURIEL WATT MEAD, *et al.*,
Petitioners,

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of the Ninth Appellate District, Lorain County, Ohio

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Supreme Court of the United States

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MURIEL WATT MEAD, *et al.*,
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vs.

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PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of the Ninth Appellate District, Lorain County, Ohio

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Appellate District of the State of Ohio entered on June 27, 1973, calling into issue the clarification of (1) the right of a news journalist not to reveal the source of information for a news article and (2) the application of the qualified privilege doctrine to actions for libel and slander against disseminators of the news.

OPINIONS BELOW

The Court of Common Pleas for Lorain County, Ohio, rendered an opinion in favor of the petitioners on December 9, 1971, and subsequently reversed its ruling on September 15, 1972. Thereafter, on June 13, 1973, the Court of Appeals for the Ninth Appellate District of the State of Ohio handed down an opinion adverse to the petitioners and on October 18, 1973, the Supreme Court of the State of Ohio dismissed an appeal from the Court of Appeals. For the convenience of the court, the opinions have been printed in a separately bound appendix hereto.

JURISDICTION

The order of the Supreme Court of Ohio in Case No. 73-722 entitled *Muriel Watt Mead, et al vs. Horvitz Publishing Company, et al.*, dismissing the appeal from the Court of Appeals was made and entered on October 18, 1973. Thereafter, petitioners made application for an order extending time to file petition for writ of certiorari. This request was granted by the Honorable Mr. Justice Potter Stewart extending the time for filing to and including March 16, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Is Ohio Revised Code Section 2739.12 which grants a newspaper reporter the right not to reveal a source of information unconstitutional in so far as it applies to the identity of the informant whose material provided, is itself, the subject of a legal proceeding for conspiracy to libel?

2. Should the rule established in *Rosenbloom v. Metromedia,* 403 U.S. 29, concerning application of the doctrine of qualified privilege to the news media, be broadened so far as to include publication of confidential financial information consisting of a list of creditors' claims on a privately owned business?

3. Whether the application of the doctrine of qualified privilege constitutes a denial of the petitioners' right to privacy under the Fourth Amendment and due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution?

4. If the legal doctrine of qualified privilege does not apply to the respondent's article, does the evidence in this case consisting of the pleadings, interrogatories, depositions and affidavits conclusively establish the existence of genuine material issues of fact at dispute which preclude summary judgment and require this case to be submitted to a jury?

5. Does the granting of a summary judgment without affording the claimant the opportunity to submit opposing briefs, participate in oral hearings, and give access to proper pre-trial discovery constitute a denial of the petitioner's right to due process of law under the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 2739.12 reads:

> "Section 2739.12. Newspaper reporters not required to reveal source of information.

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof."

STATEMENT OF THE CASE

During the middle 1960's, petitioner, Mrs. Muriel Watt Mead, formed a private corporation named Washington Square, Incorporated, for the sole purpose of constructing an apartment in Lorain, Ohio, a community of about 80,000 people in close proximity to the City of Cleveland. The transaction was effected by Mrs. Mead transferring certain real estate owned by her to Washington Square in return for 380 shares and controlling interest in this company.

Mrs. Mead engaged the services of a local accounting firm, the respondent, Frank, Seringer & Chaney, to oversee both her personal and business financial affairs, including those of Washington Square. Unknown to her, this firm also represented many sub-contractors to whom Washington Square owed sums of money.

As time passed, working capital became a serious problem to the construction project. Thus, in the summer of 1966, a meeting was called to discuss finances. At that meeting, respondent accountant, Frank, convinced Mrs. Mead to personally contribute Ninety-Six Thousand

Dollars ($96,000.00) of her own money as well as assign creditors' claims over to himself and co-conspirator respondent, attorney Warhola, who were to work together and straighten out the financial difficulty of the company. Unknown to the petitioner, both Frank and Warhola were associated with certain other entities which were to later acquire the apartment project at a bargain price in foreclosure.

A few days later, at approximately the time of completion of the project, respondents met and devised a scheme to publish a phony listing of creditors' claims in the Lorain County Journal, a newspaper of general circulation, owned and operated by respondent, Horvitz Publishing Company. The article as it appeared, claimed to be an accurate statement of accounts Washington Square owed to some 43 creditors. In truth, it contained a grossly inaccurate and exaggerated picture of insolvency, wherein 18 of the creditors' accounts were false creating a total overstatement of $178,263.18.

As a result, company creditors made a premature run on the company for payments forcing it into total ruin. Then furthering the conspiracy, respondents were able to get other lending institutions to withdraw and cancel various financial arrangements relating to the construction project, wherein most remaining creditors demanded immediate payment before construction could be completed, and Washington Square was forced to sell out to the conspirators.

Throughout this period, the petitioner, Muriel Watt Mead, was forced to invest considerable sums of her own personal money in an attempt to first implement then salvage the project. As the need increased, she completely lost her other business operations unassociated with Washington Square, as well as suffered total loss of her personal

reputation. In addition, during the years 1966 and 1967 Mrs. Mead, an already aging woman, faced threats, intimidating remarks, anonymous phone calls, and constant harassment from respondents which eventually caused her to suffer a nervous breakdown and necessitated permanent relocation in California.

Thereafter, the petitioners, Washington Square, Incorporated, and Muriel Watt Mead, filed a Complaint in Lorain County Common Pleas Court alleging a conspiracy to libel by nineteen Lorain area defendants made up of respondent attorney, accountant, bank, sub-contractors, newspaper and its agents. Voluminous exchange of interrogatories transpired. Numerous attempts were made by respondent to block pre-trial discovery most importantly of which concerned the overruling of a motion filed by petitioners requesting the identity of the informant who supplied the newspaper with the list of creditors on the basis of Ohio statutory law.

Subsequently, in July of 1971, a Motion for Summary Judgment was filed on behalf of four defendants, all of whom were connected with the newspaper that printed the libelous material. Their motion contained only affidavits and a bare assertion there were no genuine issues of fact. Plaintiffs submitted a Memorandum in September of 1971. The defendants filed a Supplemental Brief reiterating an absence of disputed issues, and for the first time claimed that the false publication of creditors' claims out of which this suit arose was a qualifiedly privileged article falling within the concept of protected material under the First Amendment of our Federal Constitution and the landmark decision of *New York Times v. Sullivan*, 376 U.S. 254. After reviewing the Memorandums, the Record, and applicable authorities, Judge Henderson denied summary judgment in December, disagreeing with

respondents saying there were definitely genuine issues of material fact which needed to be submitted to a jury.

Six (6) months later, once trial had already been set, the same newspaper defendants filed a Motion to Reconsider Summary Judgment. On September 14, 1972, the trial court ruled that under the Supreme Court guidelines set forth in *Rosenbloom v. Metromedia*, 403 U.S. 29, the doctrine of qualified privilege applied to the case at bar. Consequently, it no longer made any difference if the petitioners proved the article in question to be untrue or that the newspaper agents failed to verify the accuracy of their story.

In addition, the court further reasoned if the article itself could not be libelous then it follows that there can be no action for conspiracy to libel. Thus, the trial court notified all counsel by a letter that it would similarly sustain motions for summary judgment with regard to all other defendants, as each was filed. All remaining defendants followed this directive and the Court granted each party a summary judgment without giving plaintiffs an opportunity for opposition either by way of memorandum or hearing.

From these rulings granting summary judgment and the complete disregard for procedural prerequisites exercised by the trial judge, the petitioners appealed to the Court of Appeals, Ninth Judicial District, Lorain County, Ohio. In June of 1973, The Honorable Judge Victor handed down an opinion affirming the position of the trial court. Petitioners renewed their claim in a Memorandum in Support of Jurisdiction filed with the Supreme Court of Ohio, however, were defeated on the ground that they presented no constitutional questions.

REASONS FOR GRANTING THE WRIT

Argument I—Unconstitutional and Conflicting Statute

At common law, communications made to journalists did not enjoy any privilege against later use as evidence in a legal proceeding. Consequently, newspapers could always be compelled to reveal information given to them in their professional capacity, as well as the identity of the individual from whom that information eminated. (See 7 A.L.R. 3rd 592.)

For years, news gathering and disseminating organizations have bitterly argued that such evidence must be prohibited in order to encourage freedom of speech as provided in the First Amendment. Yet from the very beginning of our nation until 1958, no such suggestion was legally asserted and our news media got along quite well gathering news without it.

But then many states including Ohio, subsequently enacted statutes in agreement with the press which were designed to shelter such information. Most particularly in 1953, the Ohio State Legislation enacted Ohio Revised Code Section 2739.12 granting a newspaper reporter the right not to reveal the identity of a source of information in a news article. The statute remains on the books as all encompassing, including those times a newspaper reporter becomes involved in a legal proceeding.

As pointed out, the statute being in derrogation of common law must be narrowly construed. Thus, much sister state case law has arisen providing a basis for areas where it has been held unanimously that the privilege may be waived. (See 9 CLEVELAND MARSHALL LAW REVIEW 2d, 314, OHIO STATE LAW JOURNAL No. 2, 382) whenever (1) the inquiry relates to the 'means' of acquiring the information; *State v. Donovan*, 30 Atl. 2d 421 (N.J.); or (2) where the defendant relies upon the defense of truth; *Bro-*

gan v. Passaic Daily News, 122 Atl. 2d 473 (N.J.); (See also: *Cepeda v. Cohane*, 233 Fed. Supp. 465 (N.Y.); also, *In Re: Taylor*, 193 Atl. 2d 181 (Pa.).) But most importantly, the very constitutionality of this statute now appears in doubt. For on June 29, 1972, this Court handed down a historical ruling contained in *Branzburg v. Hayes*, 408 U.S. 665, saying that a newspaper could no longer use the First and Fifth Amendments as an excuse for concealing its source of information when brought before many types of legal proceedings.

In the present case, the Lorain Journal and its agents have refused to identify the person or persons from whom the contents of the libelous article were received. This information is at the very crux of a law suit for conspiracy to libel in which the newspaper itself is named as a litigant. Repeated attempts by way of interrogatories, depositions and motions to compel the revealing of the identity of the person who supplied the creditors' list have been denied by the Court. Similarly, the plaintiffs have been unable to obtain any information posed about persons associated with the publication itself, or those who possessed knowledge about compiling, editing,and the planning behind the article.

The case now before this most Honorable Court contains allegations centered around a conspiracy to publish libelous material. Paramount among items for discovery lies the identity of the person or persons who supplied the Lorain Journal with the so-called list of creditors and amounts owed by plaintiff-appellant, Washington Square, Incorporated.

Throughout the course of this litigation, the five appellees associated with the Lorain Journal have done everything within their power to impede discovery surrounding the actual publication of the libelous article in

question, and with the prejudicial rulings of the Common Pleas Court supported by Ohio Revised Code Section 2739.12 and upheld by the Court of Appeals, it has been totally impossible to get at vital information concerning this particular phase of the conspiracy.

In the first place, petitioners feel that Ohio Revised Code 2739.12 never was designed to protect respondents as to the physical means of gathering or validating the information published. In the second place, as for the narrower question concerning identity of source, the petitioners argue that the respondents at the very least waived said privilege whenever they introduced the affirmative defense of truth, but even more importantly in light of *Branzburg, supra,* that the statute itself is unconstitutional whenever the information sought to be protected is actually the subject of a lawsuit such as here.

The petitioners easily conceive why the respondents possess a preference here for anonymity in order to escape liability in a civil action and avoid possible later criminal prosecution. While understandable, this is hardly an excuse deserving of constitutional protection in a nation of law and order which traditionally has encouraged the revealing of shady wrongdoings.

There is no reason a newspaper or its agents should not be likewise encouraged to open its door for inspection to the same degree as the entities or persons about which it reports. By denying such opportunity in the present case, the courts below have severely hampered progress of discovery and prejudiced petitioners to the point where this ground in and of itself constitutes severe denial of due process.

Argument II—Qualified Privilege

Throughout the framework of defamation law as applied to the news media, there runs a concept commonly called "qualified privilege." This principle is, of course, universally referred to, in legal circles, as "The New York Times Rule." It arose out of the underlying rationale that certain subject matter is by its very nature of such importance that we must do everything to see the material becomes exposed to public limelight even if publication infringes upon the right of an individual's constitutionally guaranteed right of privacy and due process as found under the Fourth and Fourteenth Amendments of our Federal Constitution.

In effect, the rule seriously limits the right of a person in an affected area to have redress in a court of law for libelous matter to which he finds himself victim. Very important factors are changed. The individual plaintiff who attempts to sue a newspaper is held to a higher degree of proof to establish his case. No longer is it enough to show that the libelous article was untrue, or that the newspaper publishers failed to act like responsible professional journalists, who check into the facts first before they are printed. *Beckley Newspaper v. Hanks*, 389 U.S. 81. No longer is a "preponderance" of the evidence enough to establish a defamation case. Instead, in those areas covered by the privilege, the plaintiff must now prove his case by "clear and convincing" evidence.

The privilege began with the landmark *New York Times v. Sullivan* case, 376 U.S. 254, which held that this qualified protection must be accorded publications concerning "public officials." Over preceding years the concept has gradually been broadened to encompass "public employees." *Rosenblatt v. Baer*, 303 U.S. 75, then "public servants", *Garrison v. Louisiana*, 379 U.S. 77, until now

the paramount consideration is to protect those areas deemed to be of "public interest." *Time, Inc., v. Hill,* 385 U.S. 374.

Most recently, on June 7, 1971, this Court specifically considered in *Rosenbloom v. Metromedia,* 403 U.S. 29, the crucial question of whether or not the New York Times Rule applied to "private individuals" as well as to public officials or public figures. In its decision, the Supreme Court of the United States did recognize a shift toward "public interest" rather than one's "official capacity" as the governing factor. Yet, it did not anywhere proclaim coverage to all private individuals.

In speaking about freedom of expression in the private sector, the Court mentions extended coverage only to:

> "Issues about which information is needed as appropriate to enable the members of society to cope with the exigencies of their period." (*Supra* 41)

or

> "Those areas of economics and social power that virtually affect the nature and quality of life in the nation." (*Supra* 41)

The guideline becomes the importance of the event itself:

> "The conduct of the participant and the content effect and significance of the conduct." (*Supra* 43)

Thus, petitioners believe there must be *considerable* public interest before the New York Times Rule applies to any given situation.

In the case at bar, the Ohio Court of Appeals upheld the lower court ruling saying that the libelous article containing a false list of 43 of Washington Square's creditor claims, falls under the doctrine of qualified privilege. Certainly the present case involves no issue of constitutional magnitude. Mrs. Mead is an elderly lady never in the public limelight. Washington Square was formed solely

to construct and operate one small apartment project of little interest to anyone. It was a privately owned entity. Its financial status could be no more than of passing concern to anyone except the immediate parties to this lawsuit. It had no registered securities on an open market. In the normal course of news reporting, petitioners fail to understand how information pertaining to a company's open credit accounts could hardly be deemed even newsworthy, let alone constitute material of vital public interest. As a matter of fact, the very publication and degree of detailed information printed by the Lorain Journal in this case can but give rise to much suspicion as to their real motive in publishing the list in the paper at all.

Furthermore, in looking at the lower court opinion, along with the ruling in the Ohio Court of Appeals, and past argument posed by respondents quoting the *Rosenbloom* case, one gets the distinct impression that the terminology "public interest" and "newsworthy event" are one and the same. The absurdity of such a statement is obvious. If this were true, then every article ever published in a newspaper or word spoken on radio or television would be covered by the privilege. The result of such reasoning is staggering. For, in effect, we would be giving our news journalists a license to lie!

In the present litigation, this Court has before it a case sounding in conspiracy to libel. The petitioners are a private person and private entity found victim of a horrendous plan for bankruptcy, all for a few individuals' personal monetary greed. The story of the conspiracy itself may now be of public interest. But we are not concerned here with the result of the conspiracy. We are concerned with the question of whether or not the original newspaper article containing a list of 43 accounts payable owed by a privately owned company is subject to privilege.

The respondents feel this is not what this United States Supreme Court held in its very important series of decisions beginning with the *New York Times* case all the way to the most recent *Rosenbloom* ruling. Thus it is, petitioners contend that this wrongful interpretation of the Supreme Court holdings by both the Ohio Courts and by respondents has led to a flagrant violation of a private corporation and a private individual's right to privacy and due process of law.

Argument III—Due Process

In addition to the very important definitive legal areas previously mentioned, the petitioners feel compelled to very briefly point out the effect of the adverse rulings and the blatant disregard for procedural dictates which have resulted in serious encroachment upon the right of due process and equal protection of the law. These issues were extensively discussed at lower judicial proceedings and will be referred to in greater detail in the more comprehensive brief should this Honorable Court grant certiorari.

Suffice it to say here, any party has a basic right to submit opposing briefs and participate in oral hearing whenever faced with an opponent's motion for summary judgment. *Bowdidge v. Lechman*, 252 F.2d 366. *Dredge v. Penny*, 338 F.2d 456. However, in this action, a very strange procedural event took place due to the lower court's interpretation of the aforementioned qualified privilege doctrine.

On June 9, 1972, the sole issue before the court pertained to the legal question of qualified privilege, peculiarly associated to only the five movants and not to any of the other remaining fourteen non-newspaper parties. Petitioners contend the liability of only those five litigants

were before the court. Yet this was not the case, as far as the trial court was concerned. For along with its decision granting summary judgment, a letter accompanied the journal entry; the second paragraph reading as follows:

> "For the further information of plaintiffs' counsel herein, Summary Judgment Motions will be sustained with regard to all other defendants in this particular case once the Motions have been filed." (See Appendix, p. 4.)

Immediately following said invitation, the other respondent filed bare Motions and Journal Entries for Summary Judgment, all of which were granted within days and without according petitioners a right to oral hearing or the filing of depositions of non-newspaper respondents Frank and Warhola. Such action clearly denied them due process of law, especially in light of Ohio law which quite clearly states that a Court has no authority to enter Summary Judgment "sua sponte" without the formality of notice and hearing. *Napier v. Banks*, 38 Ohio Ops. 2d 320.

Furthermore, petitioners can by no stretch of the imagination see how a summary judgment could have been granted in this case. In the first place, removing a type of action such as conspiracy to libel from a jury is impractical because of tortious elements involving subjective feelings which by their very nature should be presented to a jury *Poller v. Columbia Broadcasting System*, 368 U.S. 464. *Hartman v. Time, Inc.*, 69 F. Supp. 376, *Cross v. United States*, 336 F.2d 431, particularly in libelous newspaper publications where the application of the qualified privilege doctrine is itself a jury question. *Goldwater v. Ginzburg*, 261 F. Supp. 784; *Dodd v. Pearson*, 277 F. Supp. 469, *McGovern v. Martz*, 182 F. Supp. 343, or libelous pub-

lications of a company's financial standing such as here. *Atlas Sewing Center, Inc., v. National Association of Industrial Sewing Machine Dealers,* 260 F.2d 803.

Once this Court grants certiorari and the record is transferred to members of this honored bench for review, the legitimacy of petitioners' argument will become obvious. A myriad of genuine issues are disputed and supported in sworn interrogatories, affidavits and depositions offered by both petitioners and respondents to this case. Should the Court affirm the position of petitioners' previous argument on the inappropriate application of the privilege doctrine then truth of the article itself and verification of its accuracy become important determining factors. On these points the petitioners' evidence conclusively proves 18 of the 43 so-called creditors' claims totaling an excess of over $175,000.00 were false and that the article was a reprint of another list introduced earlier at a confidential financial meeting with certain damaging alterations made by the newspaper. Other leading areas of dispute concern a promise by the paper to print a retraction, the dual representation of respondent attorney and accountants, the motive and real purpose of the financial meeting held shortly before the libelous article appeared in the paper and finally the slanderous remarks made personally to Mrs. Mead by various of the respondents.

These are just a few of an inexhaustible number of conflicting areas going to the heart of intent, motive and fraud determinable only by the trier of facts and not to be summarily weighed by the court as occurred in the case at bar. As a result, petitioners have been wrongfully denied their rightful day in court. In so acting, the lower courts have committed serious constitutional error and

denied petitioners due process of law accorded by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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SUPREME COURT, U. S.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the Ninth Appellate District, Lorain County, Ohio

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APPENDIX

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed December 9, 1971)

Case No. 71855

COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
Plaintiffs,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Defendants.

JOURNAL ENTRY

This cause came on to be heard on the Joint Motion for Summary Judgment filed by The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Newspaper, Inc. on the 26th day of November, 1971.

This Court, after a careful review of the authority cited and the arguments of counsel, finds that the Motion for Summary Judgment of all movants is not well taken and must be overruled.

The inferences that may be drawn from the facts presented to the Court must be viewed in the light most favorable to the party opposing a Motion for Summary Judgment.

The Court specifically finds that there are in this case genuine issues of material fact which require submission of these issues to the jury. It is the opinion of this Court that a libel action is not appropriately disposed of by summary judgment where the issues of motive, intent, and other subjective feelings are involved, and these issues must be presented to the jury, where the opposing parties would have an opportunity to cross-examine the movants.

IT IS THEREFORE ORDERED and DECREED the Joint Motion for Summary Judgment filed by The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Newspaper, Inc. is hereby overruled. Exceptions.

LETTER OPINION OF THE COURT OF COMMON PLEAS

(Dated September 15, 1972)

COURT OF COMMON PLEAS
Ashland County
Ashland, Ohio 44805

September 15, 1972

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212 Ohio Edison Building
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Mr. W. P. Mahle
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Gentlemen:

Re: Muriel Watt Mead, et al vs.
Horvitz Publishing Company, et al
Lorain County Common Pleas Court
Case No. 71855

The Court has finally had the opportunity to put into writing in an opinion and judgment entry the decision of this Court with regard to the motion for reconsideration of the summary judgment motion. After thorough study of Civil Rule 56 and a complete and exhaustive study of the law with regard to conspiracy and actionable libel, it is the decision of the Court that there is no genuine issue as to

any material fact in this case, and that judgment in favor of the defendants should be granted upon the summary judgment motion. Hence, I have today forwarded to the Clerk of the Court of Common Pleas of Lorain County, Ohio the original of the enclosed opinion and judgment entry.

For the further information of plaintiffs' counsel herein, summary judgment motions will be sustained with regard to all other defendants in this particular case once the motions have been filed.

I know that this has been a long and involved case for all parties to this law suit and I noted that this judge sitting in the Common Pleas Court of Lorain County, Ohio was appointed by the Supreme Court almost two years ago to decide this matter. I am surprised that nothing more in the way of depositions or affidavits were filed during that period of time by the plaintiffs insofar as the motion for summary judgment is concerned; however, under Civil Rule 56 this Court now believes that it has no alternative under the state of the evidence which we find in this case but to sustain the motion for summary judgment.

Very truly yours,

/s/ ROBERT E. HENDERSON
Judge

REH:mh

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

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COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
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Defendants.

JOURNAL ENTRY

HENDERSON, *J.*

This cause came on to be heard on the motion of defendants, The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr. and Horvitz Newspapers, Inc., for reconsideration of their prior motion for summary judgment. Said defendants have renewed their prior motion for summary judgment and moved for dismissal of the action against them.

The motion is made on the grounds that there is no genuine issue as to any *material* fact and that the moving parties are entitled to judgment as a matter of law as shown by the pleadings consisting of a petition, amended petition, second amended complaint, answer of defendants, affidavits of Jack LaVriha, Jr., Irving Leibowitz, Harry Horvitz, Attorney William G. Wickens, Andrew Warhola, Gladys Kastler and Attorney Walter Mahle.

The second amended complaint filed herein by plaintiff asked for damages in the amount of $1,334,000.00 for alleged libel in an article published in the Lorain Journal on the 19th day of September, 1966, which article set forth a list of creditors and the amounts due them and yet unpaid.

This Court overruled the original motion for summary judgment in order to permit plaintiffs an adequate opportunity to conduct discovery procedures which it now has had an ample opportunity to do. The Court notes that the original petition in this case was filed in this court on September 18, 1967 and that the second amended complaint was filed in this court on October 30, 1970. On the hearing on the motion to reconsider the summary judgment motion held in this court on July 6, 1972, no additional affidavits were filed or presented by the plaintiffs and there is no new evidence presented by way of affidavit or deposition by the plaintiffs to prove a conspiracy on the part of these defendants or that defendants knew of the falsity of the story which was run September 19, 1966, or that defendants recklessly disregarded the truth in publishing said article.

This motion for summary judgment and the motion to reconsider the motion for summary judgment has been filed under Civil Rule 56, which provides in part that upon hearing, a decision is to be rendered upon the evidence and stipulations and affidavits filed, and from such evidence the facts must be conclusive so that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made.

Civil Rule 56 (E) provides in part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party

> may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Defendants urge upon the Court the fact that there are two reasons why this summary judgment should be granted and the second amended complaint dismissed—first, there is no proof of a conspiracy among the parties, and, second, that the publication is privileged under the Constitution of the United States. The Court will discuss each reason separately:

1. There is no evidence that the Lorain Journal Company, its editor or reporter have conspired with any other defendant or defendants in this cause for the purpose of destroying the business and the reputation of the plaintiffs. The affidavits on file establish that the list of creditors as prepared by Mr. M. Norman Frank, accountant for the plaintiffs, was not altered by the Lorain Journal Company. Said affidavits further establish that the plaintiff, Muriel Watt Mead, was not known to the publisher, editor or reporter of the Lorain Journal. Said affidavits further establish that the list of creditors was considered to be true by the Journal and that its publication was deemed newsworthy as a matter of public interest. The affidavits further disclose that the publication of the creditors list as prepared by plaintiffs actually was published at a time when said accountant was in charge of Washington Square, Inc., as trustee, and had authority to act for said corporation. Said affidavit further establishes that Muriel Watt Mead and Gladys Kastler and other shareholders had by corporate resolution on August 31, 1966, declared that the corporation was insolvent, unable to pay its debts, and had

ordered as assignment for the benefit of creditors. No claim is made or proof offered of any improper action by the Lorain Journal Company prior to August 31, 1966 when Washington Square, Inc. was already insolvent by statement of its officers and shareholders. There is absolutely no evidence before the Court of any conspiracy connecting the Lorain Journal Company, Horvitz Newspapers, Inc., Irving Leibowitz or Jack LaVriha, Jr. with any unlawful acts committed by any other defendants. In the case of *Minarik vs. Nagy, et al.*, 9 Ohio App. 2d 194, the Court of Appeals for Cuyahoga County in the opinion quoted 10 Ohio Jurisprudence 2d 59 which states:

> ". . . Conspiracy . . . viewed as a tort, is a malicious combination of two or more persons to injure another, in person or property, in a way not competent for one alone, resulting in actual damage to him."
>
> "Conspiracy in and of itself furnishes no cause of civil action. The gist of the civil action for conspiracy is the damage caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself; and unless something is actually done by one or more of the conspirators which proximately results in damage, no civil action lies against anyone."

The Court holds in this case that there is no proof of any conspiracy and that there is no evidence of any damage caused by acts committed pursuant to the non-existent conspiracy.

2. Defendants also urged that as a matter of law there is a privilege accorded to the publication in question by virtue of the Constitution of the United States. In the instant case the plaintiffs have submitted no evidence by affidavit or otherwise to counter the affidavit of defendants that publication was made neither with knowledge or its falsity nor in reckless disregard of the truth.

This privilege began with the case of *New York Times vs. Sullivan*, 376 U.S. 254. Here the Court held that a public official suing in libel for a defamatory falsehood cannot recover unless he proves that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. It is said in the opinion of that case that exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The Court further holds in that case that the risk of exposure is an essential incident where primary value on freedom of speech and of the press is placed. This case was concerned with a public official, however, the Supreme Court of the United States extended the privilege therein announced in the case of *Rosenblatt vs. Baer*, 383 U.S. 75. Here the Supreme Court extended the protection of the rule beyond public officials to public employees holding positions of public interest. In the case of *Garrison vs. Louisiana*, 379 U.S. 64, at 77, the court further extended its rule beyond official conduct to include the free flow of information concerning public servants, holding that anything touching fitness for office is relevant and protected, including private character and improper motivation. This apparently was an indication of what was to follow, that is, public interest was to be deemed paramount and the Constitution would protect all discussions of public matters and public concerns.

In the case of *Time, Inc. v. Hill*, 385 U.S. 374, the Supreme Court extended the above rule further since in this case no public official or public figure was involved. The publication complained of an act of a play alleged to be a reenactment of events in a private home. The Supreme Court found that the report, even if false, was newsworthy and was protected as a free expression in the absence of proof that the publisher knew of the falsity of the report or acted in reckless disregard of said truth. The test now

became whether the report was a matter of public interest. In this regard the Court stated:

> ". . . We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.
>
> In this context, sanctions against either innocent or negligent misstatements would present a grave hazard of discouraging the press from exercising the constitutional guarantees. *Those guarantees are not for the benefit of the press so much as for the benefit of all of us.*
>
> A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to steer . . . wider of the unlawful zone . . .; and thus create the danger that the legitimate utterance will be penalized."

The Court finalized the rule in the case of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29. Here the Court stated that if it would fulfill its historic function, freedom of dis-

cussion must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In this case, the Court held that the mere claim of falsity or incorrectness is no longer enough to establish a libel. This case goes further and holds that a failure to make prior investigation does not constitute proof sufficient to present a jury question whether the statements were in fact made with reckless disregard or whether they were false or not. In the case of *St. Amant vs. Thompson*, 390 U.S. 727, the Court held that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. In the case at bar there is absolutely no evidence that these defendants entertained any doubt as to the truth of the publication.

The best summation of the landmark case in this field of the law is found in *Rosenbloom vs. Metromedia, Inc.*, 403 U.S. 29, where the Court said:

> "We thus hold that a libel action, as here, by a private individual against a licensed radio station for defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not."

This Court finds that there is not even a preponderance of the evidence in this case in favor of plaintiffs, let alone clear and convincing evidence of the same.

Ohio courts have followed the reasoning of the Supreme Court in the case of *Driscoll vs. Block*, 3 Ohio App. 2d 351, wherein it was held by the Court that such action in libel cannot be maintained unless the article was pub-

lished with actual malice, that is, with knowledge of its falsity or with a reckless disregard of whether or not the facts upon which the publication was based were true or false. In two unreported cases, to-wit: *Campbell vs. Mansfield Journal Company, Inc.*, decided in March of 1972 by the Fifth District Court of Appeals, and *Drye vs. Mansfield Journal Corporation*, decided by the Common Pleas Court of Richland County, Ohio, all of these principles of law as enunciated by the Supreme Court of the United States have been approved and followed in libel actions, and summary judgments have been granted and approved by the Appellate Courts when appealed.

The evidence in this case, which again consists solely in the affidavits which have been filed in connection with the motion for summary judgment, construed most favorably for plaintiff fails to show that a cause of action exists for plaintiffs against the defendants herein. Obviously, the reckless disregard standard now in force may permit recovery in fewer cases than would a rule that publishers must set the standard of a reasonable man or a prudent publisher. Obviously, every standard or rule that can be devised in this area would have some weakness. However, considering the benefit and the welfare of the public, the present rule seems to carry the greater logic for its existence as has been set out in the case of *St. Amant vs. Thompson*, 390 U.S. 727.

For all of the above reasons stated herein and applying the reasoning of the Fifth District Court of Appeals in its case of *Campbell vs. Mansfield Journal Company, Inc.*, the Court finds that the motion for summary judgment and the motion for reconsideration of the same is well taken, and that the plaintiffs have failed under Civil Rule No. 56 to present sufficient evidence, either by deposition or by affidavit, to prove to the Court that they have a cause of action against the defendants herein.

Defendants' motion for reconsideration of summary judgment is sustained and the motion for summary judgment is granted on the grounds that there is no genuine issue as to any material fact and the moving parties herein are entitled to judgment as a matter of law.

Costs taxed to the plaintiff. Exceptions noted.

ROBERT E. HENDERSON
Common Pleas Judge

OPINION OF THE COURT OF APPEALS

(Decided June 13, 1973)

Case No. 2083

COURT OF APPEALS
NINTH JUDICIAL DISTRICT
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
Plaintiffs-Appellants,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Defendants-Appellees.

OPINION

VICTOR, *J.*

This appeal stems from orders of the Court of Common Pleas of Lorain County, wherein that court granted summary judgments, each in favor of certain defendants (appellees).

This action was originally commenced on September 19, 1967. In essence, the complaint alleged a conspiracy by all defendants to libel the plaintiffs. On October 30, 1970, a second amended complaint was filed, to which answers were duly filed, joining the issues. The allegations of this second amended complaint are essentially the same as the original, namely, a conspiracy to libel.

Plaintiff (appellant) Muriel Watt Mead, a real estate developer, was the owner of certain real property in the

city of Lorain, Ohio, which she transferred to plaintiff (appellant) Washington Square Apartments, Inc. They proposed to develop a modern apartment complex on the transferred property. The multiple defendants are individuals, and companies, in the Lorain area, engaged in various pursuits which have been categorized as follows: (1) accounting, (2) legal, (3) financial, (4) publishing, and (5) construction.

The plaintiffs declare that the defendants conspired together to destroy their business and reputation, and to impugn their financial stability and business judgment; that defendants caused to be published, in the Lorain Journal, a false list of plaintiffs' creditors; that the Lorain Journal, and its editor and reporter, knew or should have known (had they investigated), that the list was false, and that the implication to be drawn from the publication was that the plaintiffs were insolvent.

Plaintiffs further allege that, as a result of this publication, their business reputations were ruined, and their assets were eliminated. Their suit was for money damages.

On July 8, 1971, the defendant, The Lorain Journal Company, and its agents, moved for summary judgment. In support of the motion, affidavits were submitted by Lorain Journal personnel (all defendants), stating they believed that: (1) the defendant Frank, who furnished the list of creditors, was a reputable accountant and had authority to prepare and circulate the list of creditors; (2) the list of creditors was a true list; (3) the list of creditors was published exactly as received; (4) the matter was one of public interest; (5) after the article was prepared, it was received by the Journal's editor, who believed it to be true and authorized its publication; (6) there was no

conspiracy between the newspaper, and its personnel, or anyone else, to destroy the plaintiffs' business and reputation.

These statements are not contradicted by any counter affidavits filed in the case.

On December 15, 1971, the court overruled the motion, stating, among other things, that "a libel action is not appropriately disposed of by summary judgment where the issues of motive, intent, and other subjective feelings are involved."

On June 9, 1972, the Lorain Journal asked the court to reconsider its previous order relative to the summary judgment, citing the case of *Campbell v. Mansfield Journal Co., Inc.*, decided March 29, 1972, by the Court of Appeals of Tuscarawas County (No. 1063, unreported), which pertains to the law of libel. The court, on July 17, 1972, after stating that: "the parties being in court with their counsel, said motion for reconsideration was orally argued to the court and submitted for decision," took the matter under advisement. On September 19, 1972, the court rendered its decision, in which it overruled its previous order, and granted summary judgment, finding that there was no evidence to prove a conspiracy on the part of the defendants, and no evidence that the defendants knew of the falsity of the published story of September 19, 1966, or that it was published in reckless disregard of the truth.

The trial court then sent letters to all other defendants which stated that, "upon their filing similar motion for summary judgment, the court will sustain said motions and will dismiss the action with regard to said defendants." This was accomplished, and it is from these orders that plaintiffs appeal.

The assigned errors are as follows:

"1. The pleadings, interrogatories, depositions and affidavits conclusively establish the existence of genuine material issues of fact at dispute which preclude summary judgment and require this case to be submitted to a jury.

"2. The lower court's application of the doctrine of privilege to the particular libelous matter which is subject of this complaint constitutes a violation of the plaintiffs' right to privacy as accorded by the fourth amendment to the Constitution of the United States.

"3. The motion for reconsideration submitted by defendants contains no new material upon which the trial court could properly reverse its previous decision.

"4. The lower court's noncompliance with procedural dictates set forth specifically in Ohio Rule 56 amounted to a complete abuse of discretion which clearly denied plaintiffs of due process of law as guaranteed in the Ohio and Federal Constitutions.

"5. The lower court's action in precluding access to proper pre-trial discovery severely prejudiced the rights of the plaintiffs."

We dismiss the appeal as to appellee Katy Capodice for the reason that it was not timely filed.

We overrule each of the assignments of error and affirm the judgment.

Assignment of Error No. 1

We have examined the pleadings, interrogatories, and affidavits submitted, and we conclude that there is no evidence of any conspiracy among the defendants to libel the plaintiffs, and no evidence of any actionable libel.

The appellants contend that summary judgment is not a proper vehicle for use in libel actions, and they have some support for that proposition. However, its use has been sanctioned in the case of *Washington Post Co. v. Keogh* (1966), 365 F. 2d 965 (writ of certiorari denied, 385 U.S. 1011).

In that case, Keogh, a United States Congressman, sued the Washington Post, and its syndicated columnist, Drew Pearson, for libel. The Post had published columns by Pearson in which he had accused Keogh of bribery. The Post was granted summary judgment, based upon affidavits by Post personnel which stated that, before publication, affiants had read the columns and had no reason to believe or evidence causing them to suspect, that the information in the columns was false. These affidavits were unimpeached. However, no investigation was made to check the accuracy of the information.

In that case, the court held that there was no disputed issue as to falsity because the unimpeached affidavits were dispositive of that issue. The court further said that even the seriousness of the charge, and the controversial character and reputation of the columnist, were insufficient to permit the inference, against the newspaper, that the columns were published with a reckless disregard of the truth, even though the newspaper had failed to investigate the accuracy of the charges.

Assignment of Error No. 2

The trial court's ruling that the doctrine of privilege must be accorded to the published matter was proper. The rule in *New York Times Co. v. Sullivan*, 376 U.S. 254, that a public official, who is suing a newspaper for libel for a claimed defamatory falsehood, cannot recover unless he proves that the statement was made with knowledge of

its falsity, or with reckless disregard as to whether it was true or false, has been applied to the private citizen, in the case of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, when the report is of "public or general concern."

The financial condition of companies and individuals engaged in the development of an apartment complex, costing several hundred thousand dollars, and which involves almost a score of local contractors, and their workmen, together with a local financial institution, and others, is certainly a matter of "public or general concern" in the area in which the complex is being erected. (See, also, *Washington Post Co. v. Keogh, supra*).

Assignment of Error No. 3

The appellants assert that "Ohio law is well settled that a court will not reconsider the same controversy on a subsequent occasion." However, if a court is of the opinion that its first conclusion is erroneous, it has the obligation to change that opinion, especially when no further action has been taken in the case. Apparently, the trial court concluded, after a reading of the Campbell case, and a review of the evidence previously submitted in the light of that opinion, that its previous conclusion was erroneous. Since no new trial date had been set, the trial court had control of this judgment, and had the power to change it. The first order was not res judicata.

Assignment of Error No. 4

We do not sanction the method used by the trial Judge, whereby he suggested that if those defendants, other than the newspaper people, filed motions for summary judgment, he would grant them. However, this was not prejudicial. Appellants recognize that if there was no actionable libel, there could be no conspiracy to libel. Summary

Judgment, as to all defendants, was proper under the state of the evidence.

Assignment of Error No. 5

We find no evidence in this record that the trial court precluded plaintiffs' right to pre-trial discovery.

We find no error prejudicial to the rights of the appellants.

Judgments affirmed.

BRENNEMAN, *P.J.*, and MAHONEY, *J.*, concur.

JOURNAL ENTRY OF THE COURT OF APPEALS

(Filed June 27, 1973)

Case No. 2083

COURT OF APPEALS
NINTH JUDICIAL DISTRICT
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
Plaintiffs-Appellants,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Defendants-Appellees.

JOURNAL ENTRY

It appearing to the court that the Motion for summary judgment filed July 8, 1971, in this case, in the Court of Common Pleas of Lorain County, by the Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Newspapers, Inc., was accompanied by the affidavits of Jack LaVriha, Jr., Irving Leibowitz, Harry Horvitz, Attorney William G. Wickens (with attached exhibits), and Andrew Warhola (with an attached exhibit);

And, it further appearing that affidavits by Gladys Kastler and Attorney W. P. Mahle were filed in the trial court;

And, it further appearing that the original Motion for summary judgment, and said affidavits, are not included in the transcript of the original papers, but that a copy

of the affidavit of Gladys Kastler is appended to the brief of the appellants, and the affidavit of Attorney Mahle is quoted in the brief of the appellees, The Lorain Journal Company, et al.;

And, it further appearing that copies of the other affidavits previously referred to herein (Leibowitz, et al.), have been supplied to this court by the Clerk of Courts of Lorain County, and that Xerox copies of such affidavits were forwarded by this court to counsel for the appellants, for verification as to their accuracy;

It is, therefore, ordered that, pursuant to Appellate Rule 9(E), the omission be corrected, and that the Motion for summary judgment, and the affidavits referred to above (the copies of which we now have), be, and they hereby are made a part of the official transcript.

MYRON T. BRENNEMAN
Presiding Judge

WILLIAM H. VICTOR
Judge

E. J. MAHONEY
Judge

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO

(Entered October 18, 1973)

No. 73-722

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MURIEL WATT MEAD *et al.*,
Appellants,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR LORAIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lorain County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

APR 4 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 73-1388
October Term, 1973

MURIEL WATT MEAD, *et al.*,
Petitioners,

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE NINTH APPELLATE
DISTRICT, LORAIN COUNTY, OHIO

BRIEF OF RESPONDENT KATY CAPODICE IN OPPOSITION

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Supreme Court of the United States

No. 73-1388

October Term, 1973

MURIEL WATT MEAD, *et al.*,
Petitioners,

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE NINTH APPELLATE
DISTRICT, LORAIN COUNTY, OHIO

BRIEF OF RESPONDENT KATY CAPODICE IN OPPOSITION

ADDITIONAL STATEMENT OF FACTS

This case was filed on September 18, 1967. Five years later, on September 21, 1972 the matter was dismissed by the Trial Court as to this respondent, and the Notice of Appeal thereto was filed on October 31, 1972. While this respondent does not agree with petitioners' interpretation of the facts, they have had their years in Courts, contrary to pages 17 and 18 of their Brief.

ARGUMENT

I. As to the Respondent Katy Capodice, the Petition for a Writ of Certiorari Fails for Jurisdictional Reasons

There is one legal argument which is applicable solely to the respondent Katy Capodice and that is the jurisdictional thirty day time limit requirement for the filing of a Notice of Appeal in Ohio courts.

> "In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days from the date of the entry of judgment or order appealed from." (Ohio Rules of Appellate Procedure, 4 (A)).

The Judgment Entry or final order dismissing this respondent from the case at bar was made and entered on September 21, 1972 in the Common Pleas Court of Lorain County, Ohio, but the Notice of Appeal as to this dismissal was not filed by the Petitioners until October 31, 1972.

Please note the opinion of the Lorain County, Ohio Court of Appeals, as follows:

> "We dismiss the Appeal as to appellee Katy Capodice for the reason that it was not timely filed." (Page 17 of Petitioners' Appendix).

The Judgment Entry of the Lorain County Court of Appeals which reiterates the opinion is attached hereto.

Summarizing, the entry dismissing the respondent Katy Capodice from this case was journalized by the Trial Court on September 21, 1972, and the Notice of Ap-

peal therefrom was filed by the petitioners forty days thereafter, contrary to the only jurisdictional requirement for an appeal in Ohio.

II. The Arguments of Other Respondents Are Adopted by Reference

The primary respondents The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Publishing Co. and other respondents will probably provide exhaustive Briefs in response to the alleged three "Reasons for Granting the Writ" set forth in the Petitioners' Brief.

As and for reasons of brevity and termination of the action against this respondent Katy Capodice, all argument contained in the Brief or Briefs of the other respondents are adopted by reference.

CONCLUSION

The Petition for a Writ of Certiorari as to the respondent Katy Capodice should be denied.

Respectfully submitted,

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APPENDIX

Judgment Entry of the Court of Appeals

(Entered June 27, 1973)

Case No. 2083

IN THE COURT OF APPEALS OF OHIO
NINTH JUDICIAL DISTRICT

MURIEL WATT MEAD, *et al.*,
Plaintiffs-Appellants,

v.

HORVITZ PUBLISHING CO., *et al.*,
Defendants-Appellees.

JOURNAL ENTRY

On consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the appeal as to the Appellee Katy Capodice shall be and it is hereby dismissed for the reason that it was not timely filed.

On further consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the court fails to find any error on the record or in the judgment and proceedings of the court below prejudicial to the rights of the Appellants, or any of them, and the judgment is therefore otherwise affirmed at Appellants' costs, the court also finding that the appeal was not frivolous, and the cause is hereby remanded to the Court of Common Pleas of Lorain County with directions to carry this judgment into execution.

/s/ MYRON T. BRENNEMAN
Presiding Judge—for the Court

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Supreme Court of the United States

No. 73-1388
October Term, 1973

MURIEL WATT MEAD, *et al.*,
Petitioners.

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT, LORAIN COUNTY, OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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Supreme Court of the United States

No. 73-1388
October Term, 1973

MURIEL WATT MEAD, *et al.*,
Petitioners,

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT, LORAIN COUNTY, OHIO

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action was commenced September 19, 1967, in the Lorain County Court of Common Pleas as Case No. 71855.

It was an action seeking a money judgment of $1,344,000.00. The Complaint alleged a conspiracy to libel. After various proceedings a Second Amended Complaint was filed October 29, 1970, from which many allegations were stricken and to which responsive Answers were then filed.

On July 8, 1971, The Lorain Journal Company, Jack LaVriha, Jr., Irving Leibowitz and Horvitz Newspapers,

Inc., defendants (who were among the twenty defendants), filed a Motion for Summary Judgment in their favor. Said motion was overruled.

On June 9, 1972, the case not then being appointed for trial, The Lorain Journal Company, Jack LaVriha, Jr., Irving Leibowitz Horvitz Publishing Co., and Horvitz Newspapers Inc., these answering defendants, filed a motion for the reconsideration by the trial court of said prior Motion for Summary Judgment, on the basis of the opinion rendered by the Court of Appeals of the Fifth District on March 29, 1972, in the case of *Campbell v. Mansfield Journal Co., Inc.*, being Case No. 1063 in the Court of Appeals of Tuscarawas County, Ohio, and by virtue of the decision of the Court of Common Pleas of Richland County, Ohio, in the case of *Drye v. Mansfield Journal Corporation*, 32 Ohio Misc. 70, both cases being decided after the trial court's prior order.

The trial court, upon reconsideration, and after notice, hearing and arguments of counsel, granted Summary Judgment in favor of said defendants, finding that there was no issue of any material facts and that the moving parties were entitled to judgment as a matter of law.

Subsequently summary judgments were rendered in favor of the other defendants, but the within Brief concerns only the position of these answering respondents.

It is to be pointed out that on page 8 of Petitioners' Brief the statement is made: "Approximately six months later, once trial had been set, the same defendants filed a Motion to Reconsider Summary Judgment." This implies that the action was set for trial when the Motion was filed, which would have been contrary to Ohio Civil Rule 56(B). This however is not true. When the Motion was filed, no trial date was then set. A date previously set had been previously rescinded by the court.

The Court of Appeals of the Ninth District affirmed the judgment of the trial court on June 27, 1973. We attach hereto a copy of the Journal Entry which was not submitted by the Petitioner. The entry set forth on page 21 of Petitioners' Appendix is an interim order made June 8, 1973, and is not the order being appealed from, entered June 27, 1973.

The Ohio Supreme Court overruled Petitioner's motion to certify, and dismissed for lack of constitutional question.

STATEMENT OF FACTS

I

We seriously and emphatically deny that the record in this case evidences the Facts as set forth in the Petitioners' Brief.

The Petitioners' Statement of the Case contains some of the allegations which were made in the Second Amended Complaint as filed in the trial court, but these purported facts are merely hoped-for evidence and are not supported by the record upon which this appeal is to be decided. Much of the so-called Statement of Facts is entirely without substance, has no relation to the record, and is no more than a claim which the Petitioners failed to substantiate.

For example: There is nothing whatever in this record to substantiate the following statements which the Petitioners set forth to this Court in the Statement of the Case which accompanied their Petition for Writ of Certiorari:

(a) "Unknown to her (Mrs. Mead) this firm (Frank Seringer & Chaney) also represented many

subcontractors to whom Washington Square owed money." (Page 5 of Brief.)

(b) "At that meeting, respondent accountant Frank, convinced Mrs. Mead to personally contribute Ninety-Six Thousand Dollars of her own money as well as assign creditors' claims over to himself and co-conspirator respondent Warhola." (Page 5-6 of Brief.)

(c) "Unknown to petitioner, both Frank and Warhola were associated with certain other entities which were to later acquire the apartment project at a bargain price in foreclosure." (Page 6 of Brief.)

(d) "Respondents met and devised a scheme to publish a phony listing of creditors' claims in the Lorain County Journal, a newspaper of general circulation owned and operated by respondent, Horvitz Publishing Company." (Page 6 of Brief.)

(e) "In truth it contained a grossly inaccurate and exaggerated picture of insolvency wherein 18 of the creditors' claims were false, creating a total overstatement of $178,263.18." (Page 6 of Brief.)

(f) "As a result, company creditors made a premature run on the company for payments forcing it into total ruin." (Page 6 of Brief.)

(g) "Respondents were able to get other lending institutions to withdraw and cancel various financial arrangements." (Page 6 of Brief.)

(h) "Washington Square was forced to sell out to the conspirators." (Page 6 of Brief.)

(i) "She (Mrs. Mead) completely lost her other business operations unassociated with Washington

Square, as well as suffered total loss of her personal reputation." (Pages 6-7 of Brief.)

(j) "Mrs. Mead, an already aging woman, faced threats, intimidating remarks, anonymous phone calls and constant harassment from respondents, which eventually caused her to suffer nervous breakdown and necessitated permanent relocation in California." (Brief page 7.)

(k) "Depositions and motion to compel the revealing of the identity of the person who supplied the creditors' list have been denied by the court." (Brief page 10.)

(l) "Throughout the course of this litigation, the five Appellees associated with the Lorain Journal have done everything in their power to impede discovery." (Brief page 10.)

(m) "The petitioners evidence conclusively proves 18 of the so-called creditors' claims totalling in excess of $175,000.00 were false." (Brief page 17.)

(n) "Other leading areas of dispute concern a promise by the paper to print a retraction, the dual representation of respondent attorney and accountants, the motive and real purpose of the financial meeting held shortly before the libelous article appeared in the paper, and finally the slanderous remarks made personally to Mrs. Mead by various of the respondents." (Brief page 17.)

II

The judgment here before the Court was rendered in a summary judgment proceedings. While the issues were framed by the pleadings, under Ohio law the Ohio

Civil Rules require that in a summary judgment proceeding one must look to the Affidavits, Interrogatories and Depositions for the determination of whether there is a judicable issue. In this case no Depositions were filed and the matter came before the court upon Affidavits and Interrogatories.

Ohio Civil Rule 56(E) provides in part that:

> "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

There is not a word of reference to any of the foregoing "facts" (as alleged by the Petitioners) in the Affidavits or Interrogatories upon which this case was submitted to the trial court. The said foregoing averments of the Petitioners are not statements of fact at all but are sheer fictions and misleading to this Court. We suggest that the inclusion of these statements in the Brief, when in fact they are false and not a part of the record, is an affront to this Court.

There is no evidence whatever that any Respondents ever discussed with other Respondents the article published in the Journal prior to publication. There is no evidence of a conspiracy. There is no evidence that any Defendant got lending institutions to shut off credit. Washington Square was at no time "forced to sell out". The Lorain National Bank (not a party) foreclosed its mortgage and the real estate of Washington Square was sold by the court in an action wherein these Petitioners were parties and no appeal was taken.

III

Because of the misleading Statement of Facts herein alluded to we will set forth the facts as we find them in the record.

The Second Amended Complaint alleges a conspiracy to destroy the plaintiffs and acquire plaintiffs' property for themselves. (See Section VII of plaintiffs' Second Amended Complaint.) It alleges that said conspiracy was proposed and put into effect by Andrew J. Warhola and M. Norman Frank, defendants; that Warhola, Frank, the Central Security National Bank and Katy Capodice, defendants, during early 1966 contacted lending agencies and made slanderous remarks about Muriel Watt Mead and caused credit to be withdrawn; that then ten contractors and materialmen who are termed "creditor defendants" submitted inflated bills by means of which Warhola and Frank prepared an outdated, overstated and exaggerated list of creditors and distributed the same in order to promote their conspiracy—all of which precedes any reference to The Lorain Journal Co., Irving Leibowitz or Jack LaVriha, Jr.

Then, with the alleged conspiracy in full bloom, Item XI of the Second Amended Complaint alleges that the conspirators then conspired with The Lorain Journal Co., its editor, and its reporter, who altered the list further and published a grossly overstated list in The Journal on September 19, 1966. Damages of $1,334,000.00 were sought.

These were the claims of petitioners' pleadings.

We now turn to see what evidence was offered upon hearing of the Motion for Summary Judgment to substantiate this Complaint.

IV

Turning now to the evidence given by affidavit to ascertain the existence of a justiciable issue as to The Lorain Journal Co., Irving Leibowitz, Horvitz Newspapers Inc. and Jack LaVriha, Jr., we find the following:

A. LaVriha's Affidavit:

1. He is and was a reporter for The Lorain Journal Co.
2. On September 18, 1966, he came into possession of a list of creditors of Washington Square Inc., as prepared by M. Norman Frank, CPA, whom LaVriha understood to be a trustee for the benefit of that corporation's creditors.
3. He believed publication to be in the public interest, many local businessmen being affected.
4. He believed the prior officers had declared the corporation insolvent and had conveyed its property to Frank as trustee for creditors.
5. He believed the list to be true.
6. His editor, Irving Leibowitz, was consulted prior to publication.
7. The list was published without alteration on September 19, 1966.
8. He never discussed Washington Square Inc. or any other plaintiff, or any of their affairs with any defendant, either by telephone, personal communication, or by correspondence prior to publication.
9. Muriel Watt Mead was then a person unknown to him.
10. On September 19, 1966, he believed Frank as Trustee had authortiy to prepare and circulate the list.

B. Leibowitz's Affidavit:

1. He is and was editor of The Journal.
2. He believed the publication to be true and approved its publication, considering it a matter of newsworthy public interest.
3. He never discussed the plaintiffs or their affairs with Frank or any other defendants herein either by telephone, personal communication, or correspondence prior to publication.
4. He had and has no knowledge of any conspiracy.
5. The subject of destroying the business or reputation of the plaintiffs or acquiring their property was never discussed by him with any party or with any person, firm or corporation.
6. The article was published in exactly the same form as received, without alteration.
7. Prior to publication Muriel Watt Mead was unknown to him and he had made no inquiry and had no interest in her or in Washington Square Inc. or in their property.

C. Horvitz's Affidavit:

1. He is publisher of The Journal and president of The Lorain Journal Co. and Horvitz Newspapers Inc.
2. Horvitz Newspapers Inc. has had no connection whatever with the publication or circulation of the article.
3. He had charged the Journal's employees prior to September 19, 1966, to publish only articles they believed to be true.

4. He has no knowledge of Muriel Watt Mead or Washington Square Inc.
5. He knows of no conspiracy and never discussed the business, reputation or property of any plaintiff with any person whomsoever before said publication.
6. He finds that the publication was made in the same form as received.

D. Wickens' Affidavit:

1. He is attorney for The Lorain Journal Co.
2. He took the deposition of Muriel Watt Mead in this case on January 13, 1968, wherein Muriel Watt Mead, plaintiff, testified that:
   a. She had signed, with other shareholders of Washington Square Inc. on August 31, 1966, a declaration that said corporation was insolvent, unable to pay its debts, and had resolved to make an assignment for the benefit of creditors.
   b. She had resigned on August 31, 1966, as director and officer of Washington Square Inc. as had Gladys Kastler, Leonard Kastler, Frank Janik and Milton Friedman.
   c. Oliver Thompson's firm had been acting as her attorney.
   d. On August 26, 1966, in behalf of Washington Square Inc. she had conveyed by deed and assignment all the real and personal property of Washington Square Inc. to Mr. Frank as trustee.
   e. On September 23, 1966, she and Gladys Kastler had purported to cancel their resignations and that on said date they had "picked up where they had left off."

E. Warhola's Affidavit:

1. On September 26, 1966, he was attorney for M. Norman Frank, as trustee.
2. On September 27, 1966, he received a letter dated September 27, 1966, from Attorney Oliver Thompson stating "As of this date, the agreement existing between Mr. Michael N. Frank and any of the herein named clients (Washington Square Inc., Muriel Watt Mead, Gladys Kastler) has been declared null, void and of no effect."

F. Gladys Kastler's Affidavit:

1. The Journal's publication of September 19, 1966, listed construction accounts of $397,746.35 owed by Washington Square Inc.
2. The published article "implied" that The Journal had "talked to M. Norman Frank that day."
3. The affiant "believed" the list had been obtained from Rosemary Kuhn or Louis Kuhn.
4. The published article did not state that in reference to three accounts totalling $80,000 the listed figures represented the full amount of the creditors' contracts, or that $90,000 represented a second mortgage to Columbia Gas.
5. The published article overstated the net indebtedness of the corporation by "approximately" 200,000.
6. The Journal made no effort to verify the amounts owed.
7. Mr. Frank has denied giving the list to The Journal.
8. On September 19, 1966, Mr. Leibowitz said the article had not been cleared with him before publication.

9. Mr. Leibowitz has said that the painter, Jack Krupp, and other subcontractors had been to see him prior to publication to confirm that the list would be published. (This is denied in the Leibowitz affidavit).

10. Mr. Leibowitz has refused to print a list of creditors as prepared by the affiant.

11. "On information and belief," affiant says that, before and after publication, Jack LaVriha "contacted" certain subcontractors regarding the financial affairs of Washington Square Inc.

G. Attorney Mahle's Affidavit:

1. He is attorney for the plaintiffs.

2. After he had requested on July 1, 1971, the taking of depositions of certain defendants, the instant Motion for Summary Judgment was filed.

3. His fees for opposing said motion to date are $280.00.

The foregoing comprise the evidence upon which the trial court decided the Motion.

V

The following observations about the facts controlled the disposition of this Motion:

1. There is not a scintilla of proof that the Lorain Journal Company, its editor or reporter, conspired with anyone. The Petitioners charge in their Complaint that other defendants were in conspiracy prior to the publication of September 19, 1966; that Frank and Warhola were the ones by whom it was "proposed, and put into effect;" that "early in 1966" the Central Security National Bank,

the creditor defendants and Katy Capodice somehow joined the conspiracy by making slanderous remarks and contacting financial institutions. But there is no evidence of any of that offered by plaintiffs in the consideration of this Motion. Then the Complaint alleges that the creditor defendants (ten of them) together with Frank Seringer & Chaney, Mr. Frank, and Mr. Warhola conspired with The Journal, its editor and reporter (of which there is not a scintilla of evidence) and that these answering defendants then further altered the list of creditors and published a list which they "knew or should have known to be false," which publication implied insolvency.

The affidavits on file establish that the list of creditors as prepared by Mr. Frank was not altered by The Journal; that Muriel Watt Mead was then unknown to the publisher, editor or reporter of The Journal; that the said list was considered to be true by The Journal and its employees; and that its publication was deemed newsworthy as a matter of public interest.

There is no evidence of any kind that The Journal and its employees did not believe the reported list to be true.

2. The affidavits on file disclose that the publication of the creditors list as prepared by Mr. Frank was published at a time when he was in charge of Washington Square Inc. as trustee and had authority to act for said corporation. It is here shown that Muriel Mead, Gladys Kastler and the other shareholders had, by corporate resolution on August 31, 1966, declared the corporation insolvent, unable to pay its debts and had ordered an assignment for benefit of creditors; that on the same day the directors and officers had resigned; that Muriel Watt Mead as president also had assigned all the property of

the corporation, real and personal, to Michael N. Frank as trustee for creditors, and made no attempt to rescind this action until September 23, 1966, which was four days after the newspaper publication. Therefore, the corporation was in the hands of a trustee for creditors when the publication was made and prior thereto Mrs. Mead and the shareholders themselves had declared the corporation to be insolvent, unable to pay its debts, and in need of a trustee for its creditors.

No claim is made or proof offered of any improper action by The Journal prior to August 31, 1966, when the company was already insolvent by the statement of its officers and shareholders.

3. Nothing in the affidavits is offered as proof that the publication was published by The Lorain Journal Company, its editor, reporter or publisher, with knowledge of its falsity or in reckless disregard of the truth. It will be observed that the Complaint does not allege the publication to have been made with knowledge of its falsity but is couched with the words that when the publication was made these defendants "knew or should have known it to be false," and nothing is offered by way of affidavit in any support thereof.

4. There is absolutely no evidence before the court of any conspiracy which would connect The Lorain Journal Company, Horvitz Newspapers Inc., Irving Leibowitz or Jack LaVriha, Jr. with any alleged unlawful acts that may have been committed by any other defendants. Neither is there any evidence of actionable libel on the part of The Lorain Journal Company, Horvitz Publishing Co., Horvitz Newspapers Inc., Irving Leibowitz or Jack LaVriha, Jr.

In summation of the facts, the trial court said in its opinion:

> "1. There is no evidence that the Lorain Journal Company, its editor or reporter have conspired with any other defendant or defendants in this cause for the purpose of destroying the business and the reputation of the plaintiffs. The affidavits on file establish that the list of creditors as prepared by Mr. M. Norman Frank, accountant for the plaintiffs, was not altered by the Lorain Journal Company. Said affidavits further establish that the plaintiff, Muriel Watt Mead, was not known to the publisher, editor or reporter of the Lorain Journal. Said affidavits further establish that the list of creditors was considered to be true by the Journal and that its publication was deemed newsworthy as a matter of public interest. The affidavits further disclose that the publication of the creditors list as prepared by plaintiffs actually was published at a time when said accountant was in charge of Washington Square, Inc., as trustee, and had authority to act for said corporation. Said affidavit further establishes that Muriel Watt Mead and Gladys Kastler and other shareholders had by corporate resolution on August 31, 1966, declared that the corporation was insolvent, unable to pay its debts, and had ordered as assignment for the benefit of creditors. No claim is made or proof offered of any improper action by the Lorain Journal Company prior to August 31, 1966 when Washington Square, Inc. was already insolvent by statement of its officers and shareholders. There is absolutely no evidence before the Court of any conspiracy connecting the Lorain Journal Company, Horvitz Newspapers, Inc., Irving Leibowitz or Jack LaVriha, Jr. with any unlawful acts committed by any other defendants. . . ."

The Court holds in this case that there is no proof of any conspiracy and that there is no evidence of any damage caused by acts committed pursuant to the non-existent conspiracy. (Pages 7-8 of Petitioners' Appendix.)

REASONS FOR DENYING THE WRIT

Response to Argument No. 1—The Alleged Unconstitutional Statute.

The Petitioners argue that Ohio Revised Code Section 2739.12, which they do not quote, is unconstitutional.

That statute provides:

> "No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof."

Petitioners cite no authority to uphold such contention of unconstitutionality except to cite *Branzberg v. Hayes*, 408 U.S. 665, which clearly made no such determination.

While this Court has held that the First Amendment does not grant newsmen a constitutional privilege that other citizens do not enjoy (*Branzberg v. Hayes*, at 690),

seventeen states, including Ohio, have provided statutory protection to a newsman's confidential sources (*Branzberg v. Hayes,* at 689), which protection this Court has never condemned.

The case of *Branzberg v. Hayes, supra,* only held that the First Amendment in and of itself, does not relieve a newspaper reporter of the obligation to respond to a *grand jury subpoena* and affords him no right to conceal the facts about a *crime* or to conceal the criminal conduct of his sources.

However, the court said:

> "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate.
>
> "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the condition and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying of course that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." (408 U.S. 665 at 706.)

In the instant case, the Ohio Supreme Court has held that no constitutional question is presented by the Petitioners. Moreover, no criminal proceedings are involved here.

We have herein responded as though the Petitioners' contention as to the constitutionality of Ohio Revised Code Section 2739.12 were relevant.

We assert the constitutionality of the statute is not necessary for decision here.

The Petitioners never sought to depose the newsmen, but in an interrogatory sought of them the source of the article in question. The court sustained objection to the interrogatory.

The source is immaterial if the publication is not actionable, as all courts below have held to date. We do not believe this Court will pass upon the constitutionality of a state statute unless required for decision.

Response to Argument No. 2—Qualified Privilege

The Petitioners in their Brief (pages 12-13) are correct in the following summation of the law of libel in the light of the First Amendment:

(a) No longer is it enough to show that the libelous article was untrue.

(b) No longer is it enough to show that the publishers made inadequate investigation.

(c) No longer is a preponderance of the evidence enough to establish a defamation case.

(d) The plaintiff must prove his case by clear and convincing evidence.

(e) The case of *New York Times v. Sullivan*, 376 U.S. 254, concerning "public officials", was gradually broadened to encompass "public employees". *Rosenblatt v. Baer*, 303 U.S. 75. Then, "public servants". *Garrison v. Louisiana*, 379 U.S. 77. Now the

paramount consideration is to protect areas of "public interest." *Time v. Hill*, 385 U.S. 374, *Rosenbloom v. Metromedia*, 403 U.S. 29.

The limitation is that in areas of general public interest the publication may not circulate knowing or reckless falsehoods.

The Court of Appeals in this case has said:

"The financial condition of companies and individuals engaged in the development of an apartment complex, costing several hundred thousand dollars, and which involves almost a score of local contractors, and their workmen, together with a local financial institution, and others is certainly a matter of 'public or general concern' in the area in which the complex is being erected." (Petitioners' Appendix, page 19.)

The record clearly shows and the trial court and Appellate Courts have held that the publication was of public and general interest and that there is no evidence of a conspiracy to libel, no evidence of an actionable libel, and hence no justiciable issue.

Response to Argument No. 3—Due Process

The Petitioners complain that after the court granted summary judgment to The Lorain Journal Co., Irving Leibowitz, Jack LaVriha, Horvitz Newspapers, Inc., and Horvitz Publishing Co. (after motion, notice, and full hearing), it granted similar judgments in favor of the other joined Defendants.

Obviously, The Lorain Journal Co. and its associated Defendants who hereby file this Brief have no interest in this phase of the Petitioners' complaint.

Suffice to say the Petitioners had full notice, hearing and due process as to the determination of The Lorain Journal Co. motion.

However, once the court determined that there was no actionable libel, the case against the co-defendants for conspiracy to libel collapsed and Petitioners received no prejudice from the court's summary dismissal of the action as to them.

CONCLUSION

The Court of Appeals in its opinion (Petitioners' Appendix, page 17) said:

> "We have examined the pleadings, interrogatories and affidavits submitted, and we conclude that there is no evidence of any conspiracy among the defendants to libel the plaintiffs and no evidence of any actionable libel."

We submit that this is the conclusion to be drawn from the record. The Petitioners have demonstrated no ground for the granting of a Writ of Certiorari.

We submit that the Writ should be denied.

Respectfully submitted,

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APPENDIX

JOURNAL ENTRY OF THE COURT OF APPEALS

(Entered June 27, 1973)

No. 2083

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

State of Ohio
ss:
Lorain County

Muriel Watt Mead, *et al*,
Plaintiffs-Appellants,
v.
Horvitz Publishing Co., *et al*,
Defendants-Appellees.

On consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the appeal as to the Appellee Katy Capodice shall be and it is hereby dismissed for the reason that it was not timely filed.

On further consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the court fails to find any error on the record or in the judgments and proceedings of the court below prejudicial to the rights of the Appellants, or any of them, and said judgments are therefore otherwise affirmed at Appellants' costs, the court also finding that the appeal was not friv-

olous, and the cause is hereby remanded to the Court of Common Pleas of Lorain County with directions to carry said judgments into execution.

WILLIAM H. VICTOR
Judge

JUL 19 1974

MICHAEL RODAK, JR., CLE

Supreme Court of the United States

No. 73-1388

October Term, 1974

MURIEL WATT MEAD, *et al.*,
Petitioners,

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

ON APPEAL TO THE COURT OF APPEALS OF THE NINTH APPELLATE DISTRICT, LORAIN COUNTY, OHIO

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

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ON APPEAL TO THE COURT OF APPEALS OF THE NINTH APPELLATE DISTRICT, LORAIN COUNTY, OHIO

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

On June 25, 1974, this Supreme Court rendered a far reaching decision on news media defamation law in the case of *Gertz v. Robert Welch, Inc.*, No. 72-617, which overturned the previous holding of *Rosenbloom v. Metromedia*, 403 U.S. 29, and now limits the landmark *New York Times* rule to only those publications covering public people and not private individuals. Interestingly enough, at the same time the Court was considering the *Gertz* case, counsel for Petitioners herein were embarked on the identical appellate road asking for the very same ruling on this case in these Honorable Chambers. A check of the Court Docket and records of this action will reveal that in March of 1974, Petitioners filed a Petition for Certiorari on behalf of a private individual named Muriel

Watt Mead for injury she sustained as the result of a grossly inaccurate and inflated list of her creditor accounts published in the Lorain Journal, the only newspaper in town. Because the trial court had previously applied the *New York Times* rule to our case, Question of Law #2 concerning the legal propositions set forth in *Rosenbloom* was brought directly to the attention of this Court in our Petition for Certiorari. This question formed the nucleus of Petitioner's brief.

The facts in the case at bar and the facts presented in *Gertz* are strikingly similar and the legal issues identical. For some reason, this Court chose to hear arguments on *Gertz* but deny Certiorari on our case also pending before it at the same time, leaving absolutely no further legal recourse for an elderly lady who fell victim to a viperous scheming political hierarchy made up of local attorneys, accountants, news media and businessmen all closely associated with the bench of Lorain County Common Pleas Court who did everything possible procedurally to deny this woman her rightful day in court before a jury of her peers.

Like *Gertz*, Mrs. Mead is purely a private individual. Both persons in a sense, are professional service people. Mr. Gertz is an attorney. Mrs. Mead invested in real estate. Both fell victim to horrendous printed lies and in each instance, these lies did great damage to the professional standing of the litigants which in the particular case of Mrs. Mead led to total financial ruin and permanent impairment to her health. Petitioner believes that her case should rightfully and logically have been joined with the *Gertz* case. Such action would have finally accorded Mrs. Mead the first true act of justice in the whole history of this case. Suffice it to say, obviously for whatever reason, this was not done.

However, the Petitioner still has faith in the wisdom, integrity and forthright dedication to justice engrained in the nine great men of this Court. Accordingly, she now respectfully requests leave to file a Motion for Rehearing of the denial of certiorari made in this case which came only a month before the rendering of the *Gertz* decision.

Petitioner steadfastly contends that under the new test espoused in *Gertz*, there can be no doubt now that the trial court in the present case committed serious reversible error. In light of the close proximity of these two cases, and the very grave injury committed to the dignity and worth of a private human being, counsel for petitioner believes there are more than enough ample grounds for the Court to so order.

PETITION FOR REHEARING

A careful reading of the *Gertz v. Welch, Inc.*, Case No. 72-617, reveals very important changes in defamation law as applied to protection accorded our news media in publications concerning the activities of private individuals. Formerly under *Rosenbloom*, it was imperative to show either (1) the defamator's predisemination knowledge of an article's falsity or (2) such reckless disregard as to constitute malice before an injured party could recover for libelous statements whose content concerned matters of public interest. Now, by *Gertz*, this application of *New York Times* strict standard has been greatly narrowed to only persons who are of general fame and notoriety and whose actions in the particular matter under consideration will likely influence resolution of the issues involved in that matter.

In the case now before this Honorable Court, we see no such person who should be accorded the First Amendment privilege doctrine. Under the new test set forth in *Gertz* there can no longer be any doubt that lower court Judge Robert E. Henderson committed serious reversible error. Basically, the *Mead* case concerns an elderly lady whose dream of being owner of an apartment building was shattered by several men who conspired to print an untrue article in the local newspaper knowing that when gross overstatements of her creditors' accounts hit the press, it would cause an avalanche of creditors' claims and foreclosure later allowing them to buy out the business at a bargain price.

To allow the press to be used as a vehicle for such a plan certainly must shock one's conscience. The average private American has a right to expect responsible journalism and the right to judicial recourse if the press does not act with true professionalism in its gathering of the news.

The Petitioner, Muriel Watt Mead, is just one such individual. She was but a mere citizen whose sole business was a real estate investment. She was not in the limelight. Her business enterprise, co-petitioner, Washington Square, was a privately owned company. Both she and the company were financially ruined by the defamatory article in question. Neither party ever had the opportunity to contradict the lies or correct the error. They were denied their legal rights in discovery by judicial fiat at every stage of the proceeding below, where the respondents filed an enormous bank of obstructive discovery pleadings, each sustained by the judge. Their number literally staggered the imagination and culminated with the last final blow rendered by the trial court granting summary judgment thereby denying Petitioners' their constitutional due process right to a trial by jury.

Should the Supreme Court elect to grant this Motion for Reconsideration and finally give the first ray of hope for justice to the Petitioner, it will not be doing so in vain. The facts and evidence below are more than enough to support the contention that Summary Judgment was wrongfully adjudged by the trial court.

Strictly legally speaking, Ohio procedural law on summary judgment is identical to Federal Law. It is found in Ohio Rule 56 which is based on Federal Rule 56. It specifically provides:

> "A summary judgment shall not be rendered unless it appears from such evidence . . . and only therefrom that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made." (Emphasis added.)

In so doing, Ohio Courts have uniformly held that the trial court cannot weight the facts in issue, but need only determine if any issue of facts exists. More particularly, *Boulds v. Smith*, 18 Ohio Ops. 2d 305, reads:

> "Respondents' motion for summary judgment should not be allowed if there is a genuine issue of material fact proper for trial. *The duty of the court is to determine* not what the facts are, but whether such an *issue of facts exists.*" (Emphasis added.)

Thus, the procedure for determining whether a movant should be entitled to Summary Judgment is to construe the evidence most strongly in favor of the person against whom the Motion is made, then see if reasonable minds could only come to but one conclusion which is adverse to that party. *Horvath v. Fisher Foods, Inc.*, 38 Ohio Ops. 2d 113. In accordance, the Court must deny any Motion if investigation of the evidence reveals any genuine issue as to a material fact. *Rainey v. Harshbarger*, 38 Ohio Ops. 2d 374.

As stated previously, the conspiracy herein centered around a newspaper article which appeared in the respondent, Lorain Journal, the only newspaper in town, purporting to be an accurate account of amounts owed by Washington Square to its creditors. Numerous factual issues in dispute are involved in the publication and dissemination of the contents of this article. Each area of dispute can be found in the record and is verified by affidavits vs. contra-affidavits, petitioners' Answers to Interrogatories vs. respondents' Answers to Interrogatories, petitioners' deposition vs. respondents' depositions, and last but not least, the actual libelous printed list of Creditors Accounts as opposed to the real list of Creditors Accounts and actual amounts owed at the time the article was printed.

Briefly, the more major disputed issues are as follows:

1. Truth of the Article Itself

PETITIONER CONTENDS	RESPONDENTS CONTEND
The article in the newspaper stated different amounts than the list upon which it was based and left out certain asterisks explaining special nature of certain accounts.	Content of the article appearing in the newspaper was identical to the list from which it came and "was published without alteration of any kind."

	Amount Actually Due	Amount Claimed Due
Claude Plumb	– 0 –	6,258.23
*Amherst Hardware	– 0 –	49,000.00
Northern Ohio Roofing	325.00	3,479.47
Kuhn's Ornamental Iron Railings	2,014.26	5,987.78
N & M Landscaping, Inc.	500.00	1,147.00
Yacobozzi Plastering, Inc.	4,000.00	5,055.36
Krupp Painting Co.	2,660.00	8,350.47
Frank, Seringer and Chaney	– 0 –	700.00
*Raymond Plumbing & Heating	– 0 –	7,500.00
Alan Freach Co.	– 0 –	69.50
Lorain Roofing Co.	– 0 –	1,400.00
Craford Door Co.	– 0 –	69.00
Plas Construction Co.	5,502.96	12,684.32
**Columbia Gas Co.	– – –	90,000.00
Batsum Bros. Co.	– 0 –	1,377.90
James McDaniel	– 0 –	48.00
Wagner Signs	– 0 –	27.50
Bryant Manufacturing Co.	– 0 –	110.87

* These items were to be paid by the Columbia Gas Company of Ohio from the proceeds of a $90,000.00 second mortgage.

**Columbia Gas Company was not a construction creditor but instead a second mortgage.

2. Identity of the Source of Information for the Article.

PETITIONER CONTENDS	RESPONDENTS CONTEND
The article itself implies that respondent's accountant submitted the information to the Lorain Journal and there is evidence to show he was in contact with the newspaper a few days prior to actual printing of the article.	The newspaper refuses to identify the party. Respondent accountant Frank denies he ever talked to the Lorain Journal.

3. Acts by Respondent Indicative of Negligence or Malice.

PETITIONER CONTENDS	RESPONDENTS CONTEND
Newspaper employee respondent Jack Lavriha wrote the article without clearance from his editor. Newspaper editor respondent Leibowitz promised to print a retraction but later refused to do so when given the correct list of accounts and creditors. Furthermore, no effort was ever made by the newspaper to verify the information. Moreover, agents of the newspaper and several contractors knew of the falsity of the article both before and after its publication.	Respondent Jack Lavriha says he obtained clearance for the article and printed it in honest belief that all facts contained therein were true. Respondent Leibowitz denies ever promising to print a retraction. Furthermore, each respondent denies any communication with each other respondent, either by telephone, personal communication or by correspondence concerning either a conspiracy or the libelous article.

4. Dual Interest Representatives by Respondent Accountant Frank and Respondent Attorney Warhola in Violation of Professional Ethics.

PETITIONER CONTENDS	RESPONDENTS CONTEND
Respondent Accountant Frank prepared and had access to the books of Washington Square, Inc. He is shown as a creditor in the published article. At the same time, he represented and was on the Board of several of the respondent contractors as well as associated with Brandywine and Saratoga Companies, who were the eventual purchasers of the Washington Square Apartments at a bargain price in foreclosure. Similar conflicts exist for Attorney Warhola.	Respondent Accountant Frank claims he never had knowledge of the company's net worth prior to the period of time one month before the article was published. He even goes on to say that he was never Mrs. Mead's accountant. Respondent Attorney Warhola also denies any sort of dual conflict of interest.

5. Nature and Objective of Meeting Held Shortly Before Libelous Article was Published.

PETITIONER CONTENDS	RESPONDENTS CONTEND
Respondents Warhola and Frank told Mrs. Mead that if they were given a free reign to work out various financial agreements with creditors of Washington Square, that everything would be straightened out. Furthermore, that petitioner was asked to personally contribute $96,000 of her own money to save the company.	Respondent Frank says he was elected as trustee and repondent Warhola appointed as his legal representative in the bankruptcy of Washington Square, Inc. He also denies making any request for Mrs. Mead's personal monetary contribution.

6. Slanderous Remarks by Various Respondents

PETITIONER CONTENDS	RESPONDENTS CONTEND
Respondent Warhola in the presence of several subcontractors stated, "I'll get you and your husband if it's the last thing I do." Mrs. Mead's phone was subjected to illegal wiretaps and she received anonymous phone calls calling her a "stupid woman" and threats such as "you better sign everything over to Warhola or you'll be sorry."	Respondent Warhola and all other respondents deny any derogatory statements or harassing remarks and conversations or wiretaps as alleged by petitioner.

These are just a few of the myriad of conflicting areas and allegations, which, if detailed, would fill a volume of reading. Suffice it to say, all these items go to the very heart of intent, motive, fraud, and subjective feelings which are only determinable by the trier of fact and not to be summarily weighted by the Court as occurred here. Certainly the case at bar falls outside the *New York Times* rule according to *Gertz* where each of the aforementioned areas would obviously have great bearing in a defamation action. Mrs. Mead is an elderly lady never in the public limelight. Washington Square was formed solely to construct and operate one small apartment building of little interest to anyone. It was a privately owned entity. Its financial status could be no more than a passing concern to anyone except the immediate parties to this lawsuit. It has no registered securities on any open market.

Everyday the business world sees floundering companies who may or may not end up in eventual bankruptcy. In the normal course of news reporting, petitioner fails to understand how information pertaining to a company's open credit accounts could hardly be a matter sub-

ject to newspaper privilege. As a matter of fact, the very publication and degree of detailed information printed by respondents in this case can only give rise to much suspicion as to their real motive in including the list in the paper at all.

Thus, it is with the recent intervening circumstances of substantial and controlling effect of the *Gertz* case along with the great need to accord justice in the present case that counsel for petitioner now hereby respectfully requests this court grant rehearing of Petitioners' previous request for Certiorari in this matter.

Respectfully submitted,

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